

**KELLEY DRYE & WARREN LLP**

A LIMITED LIABILITY PARTNERSHIP

**1200 19TH STREET, N.W.**

**SUITE 500**

**WASHINGTON, D.C. 20036**

(202) 955-9600

FACSIMILE

(202) 955-9792

www.kelleydrye.com

NEW YORK, NY

TYSONS CORNER, VA

CHICAGO, IL

STAMFORD, CT

PARSIPPANY, NJ

BRUSSELS, BELGIUM

AFFILIATE OFFICES

JAKARTA, INDONESIA

MUMBAI, INDIA

EDWARD A. YORKGITIS, JR.

DIRECT LINE: (202) 955-9668

EMAIL: cyorkgitis@kelleydrye.com

February 14, 2006

Ms. Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, D.C. 20554

*Via electronic filing*

Re: WC Dkt. Nos. 05-275 and 05-283 and CC Dkt. No. 01-92:  
Notice of Ex Parte Presentation

Dear Ms. Dortch:

Pursuant to Section 1.1206 of the Commission's rules, the undersigned counsel for XO Communications hereby provides notice of a February 13, 2006, *ex parte* meeting with Tamara Preiss, Chief of the Pricing Policy Division, Wireline Competition Bureau, and other members of the staff of the Pricing Policy Division: Steve Morris, Jennifer McKee, Christopher Barnekov, Donald K. Stockdale, Jr., and Jay Atkinson. In attendance at the meeting for XO Communications were: Brad Mutschelknaus and Edward A. Yorkgitis, Jr. of Kelley Drye & Warren LLP, and Heather Gold, Senior Vice President, Government Relations, of XO Communications. The attached slides were used at the meeting to guide the discussion which reviewed the positions taken by XO in its comments and reply comments in Dockets Nos. 05-275 and 05-283, as well as XO's position on the proposals regarding so-called "phantom traffic" made by the Midsize Carrier Coalition and the United States Telecom Association in Docket No. 01-92.

Respectfully submitted,



Brad E. Mutschelknaus  
Edward A. Yorkgitis, Jr.

Attachment

cc: Tamara Preiss  
Steve Morris  
Jennifer McKee  
Christopher Barnekov  
Donald K. Stockdale, Jr.  
Jay Atkinson

---

# **XO Communications Presentation to the Wireline Competition Bureau**

## **“VoIP Traffic Termination”**

---

**February 13, 2006**

---

## **SWITCHED ACCESS CHARGES CANNOT BE APPLIED TO INTERMEDIATE LECs**

- **Rule 69.5(b) -- "Persons to be assessed" -- expressly limits application of "[c]arrier's carrier" charges to "interexchange carriers that use local exchange switching facilities"**
  - "Interexchange carriers" are those transporting intercity telecommunications on a common carrier basis
  - Intermediate LECs act as "local exchange carriers", defined by Sec. 3(26) of the Act to include companies providing "exchange access"
  - Jointly provisioned exchange access long recognized

---

## **SWITCHED ACCESS CHARGES CANNOT BE APPLIED TO INTERMEDIATE LECs (cont'd)**

- **When multiple carriers combine to complete a communication, the Commission ruled correctly in the AT&T "IP in the Middle" Order that access charges apply, if at all, only to interexchange carriers**
  - "The interexchange carrier is obligated to pay terminating access charges [where] multiple service providers are involved in providing IP transport" (§ 19)
  - "To the extent terminating LECs seek application of access charges, these charges should be assessed against interexchange carriers and not against any intermediate LECs that may hand off traffic to the terminating LECs" (§ 23, n. 92)

---

## **SWITCHED ACCESS CHARGES CANNOT BE APPLIED TO INTERMEDIATE LECs (cont'd)**

- ❑ **Reaffirmation that intermediate LECs cannot be assessed access charges is critical**
  - ILECs are trying to reverse the Commission's decision by asserting joint and several liability claims in lawsuits, and raising the issue anew in petitions for declaratory ruling
  - Intermediate LECs should not face unfair claims for retroactive liability after relying in good faith upon the plain language of Commission rules and orders
  - The Commission should clarify that ILEC tariffs which attempt to impose access charges on intermediate LECs contravene its rules

---

**COMMISSION RULES MAKE VOIP - ORIGINATED TRAFFIC EXEMPT FROM TERMINATING ACCESS CHARGES, AND LECs CANNOT COLLECT SUCH ACCESS CHARGES UNTIL A PROSPECTIVELY APPLIED RULE CHANGE IS MADE**

- ❑ **Current rules provide that net protocol conversion creates an enhanced service (Rule 64.702(a)), and enhanced service providers are exempt from payment of access charges (e.g. Rule 69.5(a))**
- ❑ **The Commission has consistently reaffirmed the ESP/ ISP access charge exemption for over 20 years**
  - For example, in its 1997 Access Charge Reform Order the FCC stated "We decide here that [ISPs] should not be subject to access charges" (para. 345)

---

**COMMISSION RULES MAKE VOIP - ORIGINATED TRAFFIC EXEMPT FROM TERMINATING ACCESS CHARGES, AND LECs CANNOT COLLECT SUCH ACCESS CHARGES UNTIL A PROSPECTIVELY APPLIED RULE CHANGE IS MADE (cont'd)**

- ❑ **The ESP/ ISP access charge exemption extends to both "originating" and "terminating" access**
  - “Although [ISPs] may use incumbent LEC facilities to originate and *terminate* interstate calls, ISPs should not be required to pay interstate access charges" (Id. Para. 341)(emphasis added)
  - The analysis in the AT&T “IP In the Middle” Order was based on the recognition that the ESP/ ISP access charge exemption applies on the terminating end under certain circumstances

---

**COMMISSION RULES MAKE VOIP – ORIGINATED TRAFFIC EXEMPT FROM TERMINATING ACCESS CHARGES, AND LECs CANNOT COLLECT SUCH ACCESS CHARGES UNTIL A PROSPECTIVELY APPLIED RULE CHANGE IS MADE (cont'd)**

**□ The ESP/ ISP access charge exemption applies to intercity communications**

- "ISPs may pay business line rates ... rather than interstate access rates, even for calls that appear to *traverse state boundaries*" (Id. ¶ 345)(emphasis added)
- The AT&T "IP in the Middle" Order assumed that interexchange traffic should be considered as "enhanced" under certain circumstances (see ¶ 19 thereof)
- Enhanced traffic that originates and terminates in the same local calling area is inherently local and the access charge exemption is neither applicable or necessary



---

**COMMISSION RULES MAKE VOIP – ORIGINATED TRAFFIC EXEMPT FROM TERMINATING ACCESS CHARGES, AND LECs CANNOT COLLECT SUCH ACCESS CHARGES UNTIL A PROSPECTIVELY APPLIED RULE CHANGE IS MADE (con’td)**

- ❑ **The Commission is properly considering whether the ESP/ ISP access charge exemption should be modified prospectively in the context of the IP-Enabled Services (2004) *and* the Unified Intercarrier Compensation (2005) rulemaking dockets**
  - ILECs should not be permitted to engage in an end run around ongoing notice and comment rulemaking proceedings
  - An exemption has the status of a rule under the APA, and cannot be modified retroactively

---

**COMMISSION RULES MAKE VOIP – ORIGINATED TRAFFIC EXEMPT FROM TERMINATING ACCESS CHARGES, AND LECs CANNOT COLLECT SUCH ACCESS CHARGES UNTIL A PROSPECTIVELY APPLIED RULE CHANGE IS MADE (cont’d)**

- The Commission cannot use declaratory ruling procedures to modify an exemption with the status of a rule
- Even SBC/AT&T now concedes that the exemption for access charge for VoIP - originated traffic can be made only prospectively: "[SBC/AT&T] continues to believe that the Commission should -- on a *prospective basis* -- apply interstates access charges uniformly to all IP-PSTN services" (Comments on Grande Petition, p. 5)(emphasis added)

---

## **"PHANTOM TRAFFIC" PROBLEMS CAN BEST BE RESOLVED BY CARRIER-TO-CARRIER CONTRACT NEGOTIATION, NOT BY NEW AND HEAVY HANDED REGULATION**

- ❑ **As Verizon points out, both contracts and tariffs already provide relief for all types of so-called "phantom traffic"**
  - ICAs are replete with mutually agreed requirements for call signaling and call routing
  - ICAs provide remedies for misconduct
  - Imposing a new layer of economic regulation to replace already successful carrier-to-carrier agreements is inconsistent with Commission policy to rely on market forces wherever feasible

---

## **"PHANTOM TRAFFIC" PROBLEMS CAN BEST BE RESOLVED BY CARRIER-TO-CARRIER CONTRACT NEGOTIATION, NOT BY NEW AND HEAVY HANDED REGULATION (cont'd)**

- ❑ **New rules pertaining to phantom traffic are not properly noticed, and cannot be adopted without a FNPRM**
  - ❑ **Rules proposed by small/mid-sized ILECs unfairly penalize intermediate carriers for behavior they cannot control**
    - Intermediate LECs should not be held responsible for any inaccurate or invalid information transmitted to them by upstream carriers or customers
    - Intermediate LECs can only retransmit the identifying information that it receives -- it cannot supply missing data or correct inaccurate data
    - Intermediate LECs cannot be required to act as the N-1 carrier
-

---

**"PHANTOM TRAFFIC" PROBLEMS CAN BEST BE  
RESOLVED BY CARRIER-TO-CARRIER CONTRACT  
NEGOTIATION, NOT BY NEW AND HEAVY HANDED  
REGULATION (cont'd)**

- ❑ **The proposed rules do not guarantee proper billing as suggested**
  - SS7 signaling was designed primarily for use in routing, not billing
  - CIC and OCN do not always accurately identify the originating service provider -- i.e. IP-enabled services
  - CPN, CN and JIP do not accurately identify the caller's location (i.e. non-geographic CPN, IP-enabled services, wireless, etc.)

---

**"PHANTOM TRAFFIC" PROBLEMS CAN BEST BE  
RESOLVED BY CARRIER-TO-CARRIER CONTRACT  
NEGOTIATION, NOT BY NEW AND HEAVY HANDED  
REGULATION (cont'd)**

- **Existing rules already require all carriers to accurately transmit and retransmit CPN**
  - If any rule change is necessary, it would be to require that ANI be passed on MF trunks